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December 23, 1996

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**Re: Policy and Rules Concerning the Interstate, Interexchange Marketplace
CC Docket No. 96-61**

Dear Mr. Caton:

Transmitted herewith on behalf of Telco Communications Group ("Telco"), are an original and eleven (11) copies of its Petition for Reconsideration in the above-referenced proceeding. In addition, a paper copy of the Petition is being served on International Transcription Services, and a paper copy and a diskette are being served on Janice Myles of the Common Carrier Bureau.

Also enclosed is an extra copy of this letter and Petition for Reconsideration. Please date-stamp the extra copy and return to the undersigned in the envelope provided.

If there are any questions concerning this matter, please contact me.

Very truly yours,



Pamela S. Arluk

Enclosures

cc: Janice Myles
ITS

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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|---------------------------------------|---|---------------------|
| In the Matter of |) | |
| |) | |
| Policy and Rules Concerning the |) | CC Docket No. 96-61 |
| Interstate, Interexchange Marketplace |) | |
| |) | |
| Implementation of Section 254(g) |) | |
| of the Communications Act of 1934, |) | |
| as amended |) | |

**PETITION FOR RECONSIDERATION
OF TELCO COMMUNICATIONS GROUP, INC.**

Telco Communications Group, Inc. ("Telco"), pursuant to Section 1.429 of the Federal Communications Commission's ("FCC" or "Commission") rules, hereby petitions the Commission to reconsider portions of its Second Report and Order ("*Order*") as discussed below.¹

Telco, as an interexchange carrier who derives the bulk of its customers through casual calling, urges the Commission to reconsider its decision implementing a mandatory detariffing policy for all nondominant interexchange carriers. At the very minimum, the Commission should permit casual calling services to be tarified with the Commission on a voluntary basis. The alternatives to tariffs that the Commission proposes for casual calling services are insufficient, overly burdensome and would undermine Telco's ability (as well as that of other carriers) to effectively provide this service, which would be contrary to the public interest.

¹ See *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Second Report and Order, CC Docket No. 96-61 (released October 31, 1996) ("*Order*").

The benefit of a casual calling service is the ability of the customer to access the carrier's network on demand, without presubscription or other prior arrangements.² Because the customer does not usually presubscribe to a casual calling service, the carrier lacks an opportunity to negotiate or execute any form of contract or agreement with the customer before the customer utilizes its service. Accordingly, the tariff serves a vital function to customers using casual calling services in providing notice of the rates, terms and conditions governing the services utilized by the customer.

The Commission's *Order*, in removing the efficient mechanism of setting the rates, terms and conditions between such carriers and its customers, threatens to undermine the rapidly growing business of casual calling. Without a tariff, it is unclear whether customers using casual calling services have any legal obligation to pay for those services, the specific rate for the services they use, and what terms and conditions will govern the services. Such ambiguity would undermine the viability of casual calling, reduce the variety of services available to consumers and thereby hinder competition by stifling a vital portion of the industry.

I. THE ALTERNATIVES TO TARIFFS THE COMMISSION SUGGESTS ARE INSUFFICIENT TO PROTECT CASUAL CALLING SERVICES

In its *Order*, the Commission recognized that carriers cannot enter into contractual arrangements with casual callers prior to the time the call is actually made.³ However, in response to the concern that detariffing will make it virtually impossible to establish the rates,

² See Comments of the Casual Calling Coalition at 2.

³ *Order* at ¶ 58.

terms and conditions between the carriers and its casual callers, the Commission suggests that other legal relationships could be utilized. For example, the Commission states that by providing billing or payment information and accepting the service of a carrier, “casual callers *may* be deemed to have accepted a legal obligation to pay for such services rendered.”⁴ The Commission further suggests that a carrier could seek recovery under an implied-in-fact contract theory.⁵

Telco urges the Commission to reconsider whether these options are a reasonable alternative to a filed tariff. To recover under an implied contract theory, the carrier would need to demonstrate that the elements of a contract existed, including terms that are sufficiently definite. “To establish jurisdiction based on implied contract, a [claimant] must establish the elements of a contract, including consideration, mutuality of intent and definiteness of terms.”⁶ Indeed, as Judge Posner so aptly noted,

the common law principle that a contract cannot be enforced if its terms are indefinite . . . retains a core of vitality. If people want the courts to enforce their contracts they have to take the time to fix the terms with reasonable definiteness so that the courts are not put to an undue burden of figuring out what the parties would have agreed to had they completed negotiations.⁷

Accordingly, an implied contract theory does not guarantee that a carrier will be able to recover

⁴ *Id.*

⁵ *Id.* at n.169.

⁶ *See Girling Health Sys., Inc. v. United States*, 949 F.2d 1145, 1146-47 (Fed. Cir. 1991)

⁷ *Goldstick v. ICM Realty*, 788 F.2d 456, 461 (7th Cir. 1986); *see also Neeley v. Bankers Trust Company of Texas*, 757 F.2d 621, 628 (5th Cir. 1985) (“Courts refuse to enforce agreements that contain indefinite promises or terms they deem essential precisely because judicial clarification of the uncertainty entails great danger of creating intentions and expectations that the parties never entertained.”).

for calls made by a casual caller. The carrier will still have to demonstrate that there were definite terms that the parties agreed upon. Without a tariff, however, such a showing becomes highly burdensome for a carrier to make.

Tariffs are essential for companies such as Telco, because in casual calling arrangements, it is the tariff that supplies the terms to which the courts are referring. Without a tariff, there is no record of the specific rate the callers should be charged, nor is there an indication of what terms and conditions, such as applicable liability limitations, govern the call and what law carriers and callers must use to resolve any disputes. In short, without a tariff, the implied-in-fact contract doctrine is useless to carriers providing casual calling services, because the carriers have no documentation to illustrate to the court any definite terms from which the court could determine the customer's obligation.

II. THE COMMISSION SHOULD ALLOW PERMISSIVE TARIFFING

While an implied contract doctrine will not protect casual calling service providers, allowing such carriers to file tariffs with the Commission on a voluntary basis would resolve this problem. Accordingly, Telco requests the Commission to reconsider its determination on this issue.

Tariffs provide a cost-efficient method of describing the legal relationship between carriers and consumers. While Telco understands that the Commission may want to relieve carriers from the obligation to file tariffs, Telco believes that it should not prohibit carriers from filing tariffs, especially for casual calling services. In its *Order*, however, the Commission rejected the suggestion that nondominant interexchange carriers be permitted to file tariffs. First,

the Commission argued that allowing carriers to file permissive tariffs would undermine the carrier's ability to negotiate contracts with its customers because of the "filed rate" doctrine.⁸

While it is true that the filed rate doctrine requires a carrier to charge its customers the rate listed in its tariff for the provided service, rather than the rate in a separately negotiated contract, the filed rate doctrine does not undermine a carrier's ability to negotiate contracts for services that are not tariffed.⁹ For example, a carrier could tariff some services, such as casual calling services, and negotiate individual contracts with customers for other services. Moreover, Telco believes that, in the case of casual calling, the Commission's "filed rate" concern is unfounded. Because carriers are simply unable to negotiate individual contracts with their casual calling customers, it would be impossible for a tariff to hinder such ability. Indeed, the choice in a casual calling environment is to allow the carrier to file a tariff or to have no contract whatsoever between the carrier and the customer.

In addition, the Commission argues that "permissive detariffing would not eliminate the collection and availability of rate information in one centralized location," and therefore, would "create the risk that carriers would file tariffs merely to send price signals and thus manipulate prices."¹⁰ Telco urges the Commission to reconsider this view. As the Commission recognized in its *Order*, there is simply no evidence that tariffs cause price coordination. The Commission stated, "evidence of tacit price coordination in the market for interstate, domestic, interexchange

⁸ *Order* at ¶ 60.

⁹ *See Maislin Industries v. Primary Steele, Inc.* 497 U.S. 116, 127 (1990).

¹⁰ *Order* at 61.

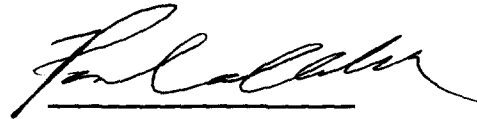
services is inconclusive.”¹¹ Moreover, the Commission’s *Order* requires nondominant interexchange carriers to make information on current rates, terms and conditions for their services available to the public. This information could just as easily be used for price coordination as could tariffs. Indeed, the only difference between the information the Commission requires carriers to provide in its *Order* and a tariff is the location in which the information is kept.

¹¹ *Order* at ¶ 23.

III. CONCLUSION

For the foregoing reasons, Telco urges the Commission to reconsider its conclusion to require mandatory detariffing for all nondominant interexchange carriers. As demonstrated above, the Commission's alternatives to tariffs do not provide sufficient protection for carriers offering casual calling services. The Commission should adopt a policy of permissive tariffing and at the very minimum should allow carriers to file tariffs for casual calling services.

Respectfully submitted,



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Dated: December 23, 1996